No. 91-100

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

RICHARD ROPER, Administrator, et al.,
on behalf of themselves and
all others similarly situated,

Petitioners,

v.

CONSURVE, INC., d/b/a BANKAMERICARD CENTER
and DEPOSIT GUARANTY NATIONAL BANK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Where a federal statute (12 U.S.C. 85) has borrowed state law on interest rates, does a retroactive change in the Mississippi law enacted after the commencement of this action extinguish a previously accrued federal penalty arising from the prior collection of usurious interest in violation of the plain language of 12 U.S.C. 86?

(2) Does the intent of Congress derived from the plain language of 12 U.S.C. 86 of the National Bank Act fixing the penalty for collection of usurious interest at the time of collection bar application of retroactive state law amendments increasing allowable interest rates above those previously adopted under 12 U.S.C. 85?

(3) Where a state (Mississippi) and Congress have different policies for the effect of subsequent legislation on the right to recover an accrued penalty, is the Supremacy Clause of the U.S. Constitution violated by the application of Mississippi doctrine to a subsequent, retroactive Mississippi usury statute so as to defeat an accrued federal penalty arising under the National Bank Act (12 U.S.C. 86) when the application of the General Savings Statute (1 U.S.C. 109) would preserve the accrued federal penalty?

PARTIES

Petitioners (plaintiffs below):

Richard Roper, Administrator, et al., on behalf of themselves and all others similarly situated

Respondents (defendants below):

Consurve, Inc., d/b/a Bankamericard Center and Deposit Guaranty National Bank

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is printed in Petitioners' Appendix at Pages A-1 - 2. It is an unreported opinion.

The analysis applied by the Fifth Circuit in Petitioners' case is articulated in the opinion of the U.S. District Court which is printed in Petitioners' Appendix at pages B-1 - 19, and, though not yet reported, will be cited as ___ F. Supp. ___ (USDC, SD Ms, 1990).

The entry of judgment by the Fifth Circuit is described in the Clerk's Memorandum printed in Petitioners' Appendix at page C-1).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 24, 1991.

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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STATEMENT OF THE CASE

This action was commenced as a class action on September 17, 1971 on behalf of credit card holders of defendant bank alleging collection of usurious interest charges in violation of the penalty provisions of the National Bank Act (12 U.S.C. 86). After an adverse ruling in the District Court on class action treatment and dismissal on the theory of mootness, the Fifth Circuit reversed on both grounds in ***Roper v. Consurve, Inc.***, 578 F.2d 1106 (5th Cir. 1978). This Court granted defendants' petition for a writ of certiorari on the mootness question in ***Deposit Guaranty National Bank v. Roper***, 440 U.S. 945, 55 L.Ed.2d 633 (1979) and subsequently affirmed rejection by the Fifth Circuit of the defense of mootness in ***Deposit Guaranty National Bank v. Roper***, 445 U.S. 336, 63 L.Ed.2d 427 (1980), rehearing denied, 446 U.S. 947 (1980).

After remand the District Court ultimately certified a class under Rule 23 of the Federal Rules of Civil Procedure and after due notice identified 76,682 members of a class defined as "all holders of Bankamericard credit cards issued by the Deposit Guaranty National Bank by whom finance charges were paid during the period between September 17, 1969 and January 7, 1974."[1]

The pivotal legal issue in this action was then presented to the District Court in the form of plaintiffs' motion for a partial summary judgment, as to whether or

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[1] The District Court in its Memorandum Opinion and Order erroneously used the year "1984" instead of "1974." This clerical error was called to its attention by petitioners, but no *nunc pro tunc* correction was entered.

not Mississippi by a retroactive change in its interest rates adopted after the commencement of this action could extinguish the federal penalty which had already accrued for the collection of usurious interest under 12 U.S.C. 86.

After over four years under submission on briefs and oral arguments and almost 19 years after the commencement of this action, the District Court entered its memorandum opinion on June 15, 1990 (See Appendix B-1-19) and final judgment in favor of the defendants on June 22, 1990 (See Appendix B-20). On appeal the Fifth Circuit, without opinion, affirmed the judgment of the District Court, and further determined that this opinion should not be published, on April 24, 1991 (See Appendix A-1-2 and C-1).

The Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. There are numerous federal, civil and criminal statutes which fix penalties for violations based on conduct proscribed by adopted or assimilated state laws. The question here presented is whether, after such conduct determined by reference to state law, and the consequent accrual of action for the federal penalty, unilateral state action retroactively amending state law can extinguish or defeat the federal penalty.

Two lines of decisions of this Court have long existed in harmony. This case elevates one over the other and produces a result not contemplated by Congress and contrary to the Supremacy Clause of the U.S. Constitution. The "most favored lender doctrine" first enunciated in ***Tiffany v. The National Bank of the State of Missouri,***

18 Wall. 409, 85 U.S. 862, (1873) which treats only 12 U.S.C. 85 adopting state law fixing the rate of interest has now been expanded to allow retroactive application of state law changes to cases arising under 12 U.S.C. 86. The doctrine of ***McCarthy v. First National Bank of Rapid City, South Dakota***, 32 S. Ct. 240, 56 L.Ed. 523 (1912), followed in ***McCollum v. Hamilton National Bank***, 303 U.S. 245, 82 L.Ed. 819 (1938), preserved for Congress exclusive control of the penalty, by making the usurious transaction complete when the debtor makes actual payment, at which point the federal penalty attaches, the cause of action arises, and the two-year statute of limitations begins to run without regard to the timing or result available under state law.

The companion doctrine of ***Farmers' & Mechanics' National Bank of Buffalo v. Dearing***, 91 U.S. 29, 23 L.Ed. 196, 199 (1875), rejected state law in the realm of the penalty by showing no concern whatsoever for the prospect of penalties in the various states being less or more severe than the penalty recoverable under the federal statute for the same conduct. The opinion of the Fifth Circuit applies the most favored lender doctrine to the federal penalty (12 U.S.C. 86) for the first time, thereby undoing the long standing policy of dominance of federal law in the context of the penalty recoverable under 12 U.S.C. 86.

Petitioners argued below and will argue here that the will of Congress expressed in 12 U.S.C. 86, bolstered by the General Saving Clause (1 U.S.C. 109) is superior to the application of state doctrine to retroactive state action, and that the Fifth Circuit erred in failing to so rule.

BASIS FOR FEDERAL JURISDICTION BELOW

Jurisdiction in the District Court was grounded upon 12 U.S.C. 86 (The National Bank Act). Jurisdiction for appeal to the Fifth Circuit by the class plaintiffs from the District Court's final judgment of dismissal of the action was based on 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

In view of the fact that the Fifth Circuit, without opinion, adopted the reasons upon which the District Court based its opinion, petitioners will refer to the District Court's opinion. The National Bank Act at 12 U.S.C. 85 (Appendix D) allows a national bank to charge interest at the rate allowed by the laws of the state where the bank is located. However, at 12 U.S.C. 86 (Appendix D) where a greater rate is knowingly charged and paid the person by whom it has been paid may recover back twice the amount of interest thus paid, provided that such action is commenced within two years from the time the usurious transactions occurred. Thus, Congress itself has fixed a uniform nationwide penalty.

A. PENALTY NOT EXTINGUISHED BY CREATING AUTHORITY REMAINS ATTACHED

The District Court determined that, at the time of the transactions involving collection of interest in this case (1969-1974), the lawful rate of interest in Mississippi applicable to these transactions was 8% per annum. The District Court also determined that a 1974 amendment

retroactively increased the rate to 1 1/2% per month, thus bringing the rates actually charged and collected by the defendants within the statute as retroactively applied.

Petitioners recognize the validity of this conclusion with respect to financial institutions organized and operating solely under Mississippi law. The general rule deprives a litigant of a vested right to a penalty such as may be recoverable for a violation of statutes regulating usury *when the government authority creating such penalty* takes away the right to the penalty prior to judgment. In a decision not involving the National Bank Act and purely applicable to state law (Texas) this court applied this principle. See ***Ewell v. Daggs***, 108 U.S. 143, 27 L.Ed. 681 (1883). But, Congress, not Mississippi, created this penalty. This Court has never applied the previously stated principle of law governing penalties so as to extinguish a penalty fixed by Congress by reason of the retroactive amendment of state law on interest rates. The District Court's reliance upon ***Ewell*** to justify extinguishment of the federally created penalty by an act of a state legislature was therefore erroneous.

B. MOST FAVORED LENDER DOCTRINE INAPPLICABLE WHEN PENALTY HAS ATTACHED

Petitioners also contend that the District Court erroneously extended the "most favored lender doctrine" first established by this Court in ***Tiffany v. The National Bank of the State of Missouri***, 18 Wall. 409, 85 U.S. 862 (1873). In ***Tiffany*** the term "most favored lender" meant that the language used by Congress in 12 U.S.C. 85 did not restrict a national bank to the rates allowed to state banks where

other lenders under the laws of the state were allowed a higher rate. (85 U.S. at 863).

However, the decision in ***Tiffany*** is clearly limited by its own language to "the rates of interest allowed in Missouri *when the loans were made* by the defendants." (emphasis supplied). As national banks were then (and should now be) expected to abide by existing laws the same as other citizens, when this Court in ***Tiffany*** observed that it was intended that national banks would be given "at least equal advantages in such competition" with state lenders (85 U.S. at 863) it was clearly and logically in the context of competition with other lenders *at the time when the loans were made* and the interest was collected. Thus, if the national bank in the case *sub judice* had charged the maximum lawful rate allowed other lenders in 1969-1974 by Mississippi it would have been at no competitive disadvantage. The opinion below permits the most favored lender doctrine to be invoked by a federal lawbreaker. Congress did not intend to enact a "most favored defendant" doctrine. The most favored lender doctrine should not be available to a national bank when it is engaged in unlawful activity.

Under the most favored lender doctrine as it has existed since 1873 in federal jurisprudence there has never been competitive equality between national banks and state lenders with respect to penalties for collecting interest at rates in excess of those allowed by the state. In a result obviously mandated by the Supremacy Clause of the U.S. Constitution, this Court gave special emphasis to the exclusive nature of Congressional control of the penalty provisions under 12 U.S.C. 86 in ***Farmers' &***

Mechanics' National Bank of Buffalo v. Dearing, 91 U.S. 29, 23 L.Ed. 196, 199 (1875), with the following language, also quoted in the briefs below:

> Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur . . .
>
> In any view that can be taken of the 30th section,[2] the power to supplement by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion.
>
> There was reason why the rate of interest should be governed by the law of the State where the bank is situated; but there is none why usury should be visited with the forfeiture of the entire debt in one State, and with no penal consequence whatever in another. This, we think, would be unreason, and contrary to the manifest intent of Congress.

(23 L.Ed. at 199)

Congress has manifested its policy for exclusive control of the penalty by adopting the same statutory structure in the case of federal credit unions at 12 U.S.C. 1785(g). (See Appendix D) and in the case of state-chartered insured depository institutions and insured branches of foreign banks at 12 U.S.C. 1831d (See Appendix D).

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[2] As noted in *Dearing, supra*, the 30th section was later divided into two sections, 12 U.S.C. 85 and 12 U.S.C. 86.

The Fifth Circuit, by adopting the reasoning of the District Court, has chosen to extend into new territory the most favored lender doctrine in a manner which intrudes upon and ignores the control which Congress retained for itself over national banks for charging and collecting usurious interest. The twofold intent of Congress is clearly demonstrated in the statutory language. While protecting national banks from unfair competition Congress also had an abiding concern in protecting the borrowing public from usury, as can be noted from the discussion of the legislative history in ***Dearing, supra,*** (23 L.Ed. at 199).

The delicate balance chosen by Congress would be destroyed at the expense of the borrowing public if this Court were to let stand the Fifth Circuit's ruling. The deterrents under state law for charging usury were not uniform in 1864 when the National Bank Act was adopted and are not uniform today. But Congress placed all national banks under a uniform deterrent. The Fifth Circuit would allow the state to retroactively lift (repeal) this deterrent – to accomplish indirectly what it is powerless to do directly. The Fifth Circuit also, by adopting the lower court's reasoning, chose to disregard the interpretation placed on 12 U.S.C. 86 by this Court in two decisions, both relied upon by petitioners in their briefs and in oral argument.

In ***McCarthy v. First National Bank of Rapid City, South Dakota,*** 223 U.S. 493, 56 L.Ed. 523 (1912), looking to the plain language of the statute this Court held that the action for the penalty accrues from the date interest is paid. In ***McCollum v. Hamilton National Bank,*** 303 U.S. 245, 247, 82 L.Ed. 819, 822 (1938), it held that the national

bank "immediately became liable" for the penalty "when the bank knowingly received the illegal interests." There is nothing in the statute of course, providing for the penalty to be extinguished upon a subsequent, retroactive change in the interest rate allowed under 12 U.S.C. 85. Had it seen fit to do so Congress could doubtless have inserted such a provision in 1864 or in the years since 1864.

By extending the most favored lender doctrine to the facts here presented the Fifth Circuit is saying that Congress intended for a national bank to be able to compete unlawfully with other state lenders by exceeding the rate allowed the others, and yet escape a penalty which is or may be more or less severe than the penalty under state law confronting its competitors. Such would undermine the balance established by Congress and recognized by this Court in ***Dearing, supra,*** which clearly insulated the penalty provisions of 12 U.S.C. 86 from application of the most favored lender doctrine.

C. STATE DOCTRINE BOWS TO CONGRESSIONAL POLICY SAVING PENALTY UNDER THE SUPREMACY CLAUSE

The Fifth Circuit, by adopting the District Court's reasoning, also ignored the Supremacy Clause of the U.S. Constitution and erroneously interposed a state court doctrine to thwart the will of Congress as expressed in the General Saving Statute (1 U.S.C. 109) (See Appendix D). By giving precedence to state court interpretation of the state's constitution and statutes under mistaken application of ***First National Bank in Mena v. Nowlin,***

509 F.2d 872, 876 (8th Cir. 1975), the decision erased a penalty theretofore attached, because of the absence, under Mississippi doctrine, of a saving clause in the 1974 retroactive law change. As petitioners argued in briefs below, Congressional policy is the exact opposite of this, and the spoken will of Congress is superior to contrary state statute and case law.

The General Saving Statute provides that the repeal of any statute shall not have the effect to release or extinguish a penalty incurred under the repealed statute unless the repealing act expressly provides. The obvious intent of Congress was to reverse the doctrine theretofore applicable, whereby the repeal of a statute without inclusion of a saving clause released or extinguished penalties not yet adjudged. Petitioners contend that the General Saving Statute clearly demonstrates the intent of Congress to retain in effect any penalty fixed by it under a statute, despite retroactive changes in the underlying law, unless Congress itself sees fit to adopt language which has the effect of extinguishing the penalty. There is nothing to suggest that Congress has delegated such authority to the state legislatures.

CONCLUSION

For the reasons assigned, petitioners respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to review its opinion and judgment, and then to reverse the judgment below, enter partial summary judgment for petitioners and remand the case for further

proceedings, in accordance with the opinion and judgment of this Court.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1592

RICHARD ROPER, On Behalf
of Himself and all Others
Similarly Situated,

Plaintiffs-Appellants,
Cross-Appellees

versus

CONSURVE, INC., d/b/a
BANKAMERICARD CENTER,
DEPOSIT GUARANTY NATIONAL BANK,
JACKSON, MISSISSIPPI,

Defendants-Appellees,
Cross-Appellants

Appeals from the United States District Court
For the Southern District of Mississippi
(No. J81 0508 (W))

(April 24, 1991)

Before SMITH and WIENER, Circuit Judges,
and SCHWARTZ*, District Judge.

PER CURIAM:**

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* District Judge of the Eastern District of Louisiana, sitting by designation.

** Local Rule 47.5 provides that "[t]he publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal

(Continued on following page)

We have concluded after analyzing the arguments advanced in counsels' briefs, hearing oral argument, and carefully reviewing the record, that the appellants' case lacks merit. Because the appellant raises no genuine issue of material fact and because this court has determined that the district court made no error of law, we affirm, without opinion, the judgment of the district court for the reasons set forth in its well-reasoned and finely crafted opinion.

AFFIRMED.

(Continued from previous page)

profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

RICHARD ROPER,
Administrator,

Plaintiffs

vs.

CONSURVE, INC., d/b/a
BankAmericard Center and
Deposit Guaranty National Bank,

Defendants

CIVIL ACTION
NO. J81-0508(W)

FILED JUN 15 1990

MEMORANDUM OPINION AND ORDER

This is a class action suit brought pursuant to 28 U.S.C. § 1331. The named plaintiffs, two "Bank-Americard" bank cardholders, sued the defendant national bank which issued the bank credit cards contending that certain charges made by defendant bank were usurious under the National Bank Act, 12 U.S.C. §§ 85 and 86. This case was appealed to the Fifth Circuit Court of Appeals, *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), and thereafter to the United States Supreme Court, *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1979), on a procedural issue relative to class certification. Subsequently, in an order dated November 10, 1980, this Court certified plaintiffs' class as:

> All holders of bankamericard credit cards issued by Deposit Guaranty National Bank by whom finance charges were paid during the period between September 17, 1969, and January 7, 1984.

The parties have filed cross motions for partial summary judgment on the issue of defendants' liability under 12 U.S.C. §§ 85 and 86 of the National Bank Act, which incorporates by reference state usury laws.

Essentially, plaintiffs contend that defendants' finance charges to the consumer cardholders exceeded the eight percent (8%) per annum maximum amount of interest allowable under Mississippi law at the time. Defendants counter that under the "most favored lenders" doctrine and the retroactive application of § 75-17-1, et seq., Miss. Code Ann. (Supp. 1975), defendants were entitled to the interest rate Mississippi afforded its most favored lender and, thus, not in violation of the usury laws as claimed by plaintiffs.

Having thoroughly considered the briefs and arguments of the parties and being fully advised in the premises, the Court finds for the defendants for the reasons that follow.

INTEREST RATES CHARGED

On behalf of BankAmerica cardholders who paid finance charges during the period of September 17, 1969, to January 7, 1974, plaintiff cardholders brought this case against Deposit Guaranty National Bank and its wholly owned subsidiary, Consurve, Inc., d/b/a BankAmericard Center. In the normal sequence of the BankAmerica card's use, plaintiffs bought merchandise or services from merchants who had previously contracted with the bank to permit such credit purchases. The merchant would then sell the credit instrument to the bank at a discount. Thereafter, the bank billed the cardholder and charged interest

on the unpaid balance, if the balance owed was not paid within a certain time frame. *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1109 (5th Cir. 1978), affirmed 445 U.S. 326, 100 S.Ct. 1166, 64 L.Ed.2d 427, rehearing denied 446 U.S. 947, 100 S.Ct. 2177, 64 L.Ed.2d 804 (1979). The process for computation of the charges to the credit card holders was described by the Fifth Circuit as follows:

> During the period in question, the bank made a monthly service charge of 1 1/2% on the unpaid balance of each account. However, each customer was allowed 30 days within which to pay his account without any service charge; if payment was not received within that time, the computer added to the customer's next bill 1 1/2% of the unpaid portion of the prior bill, which was shown as a new balance. *This is the charge contended to be usurious.* Thus, if a customer brought [sic] merchandise and the charge slip for this was received by the bank the day after a monthly bill had been mailed to him, he would not be billed for the new charge for almost 30 days and would then have 30 more days within which to make payment in full without incurring the service charge. On the other hand, an item might be received by the bank on the day before the new statement was prepared, yet the service charge for it would be computed on the same basis as if it were received at the beginning of the month. (When he received his bill, the customer might also elect to pay it in installments, in that case, the service charge was made on unpaid installments).
>
> About 35% of the bank's customers did not incur a service charge. For the 65% who did the rate was always 1 1/2% on the unpaid balance; if the effective rate was computed based on the number of days from the date the bank received

> each charge until it was paid, that effective rate would vary for each customer each month. (Emphasis added).

Roper, supra, at 1109-1110.

The controversy between the parties evolves from plaintiffs' argument that under Mississippi law the maximum rate of interest which defendants could have legally charged bank cardholders was eight percent (8%) per annum. Inasmuch as defendants charged eighteen percent (18%) per annum, plaintiffs contend that defendants' rate was usurious. In opposition, defendants claim that it was entitled to charge 1 1/2% monthly interest or finance charge (18% per annum) pursuant to the retroactive application of the 1974 amendment to the Mississippi interest statute, Miss. Code Ann. § 75-17-1, et seq., (Supp. 1975). Additionally, defendants argue that under the "most favored lender doctrine," it is entitled to charge the maximum interest rate permitted by Mississippi for the state's most favored lender.

STATE LAW

The rate of interest that a national bank may charge is ultimately a question of federal law, and the matter is governed by 12 U.S.C. § 85. *Fisher v. First National Bank of Omaha,* 548 F.2d 253 (8th Cir. 1977). By its own terms, 12 U.S.C. § 85 recites:

> § 85. Rate of interest on loans, discounts, and purchases. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the *rate*

> *allowed by the laws of the State,* Territory or District *where the bank is located, or* at a rate of *1 per centum* in excess of the discount rate on ninety-day commercial paper in effect at the *Federal reserve bank in the Federal reserve district where the bank is located, whichever may be greater, and no more, except whereby the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing* in any such State under this chapter. . . . (Emphasis added).

Thus, section 85 plainly provides that a national bank may charge interest at the rate allowed by the laws of the state in which the bank is located. *Marquette National Bank of Minneapolis v. First of Omaha Service,* 439 U.S. 299, 99 S.Ct. 540, 545, 58 L.Ed.2d 534 (1978).

A determination of the rate of interest allowed by state law has been accomplished by reference to the state court's interpretation of the state's constitution and statutes. *First National Bank in Mena v. Nowlin,* 509 F.2d 872, 876 (8th Cir. 1975), citing *Citizens National Bank v. Donnell,* 195 U.S. 369, 374, 24 S.Ct. 49, 49 L.Ed. 238 (1904). As such, 12 U.S.C. § 85 does not merely incorporate the numerical rates established by the state, but adopts and encompasses the entire body of case law interpreting the state's limitation of usury. *Nowlin,* 509 F.2d at 876.

Under § 75-17-1, et seq., Miss. Code Ann. (1972 and its supplement), each provision of the statute establishes a maximum interest rate for various types of loan or credit transactions. *Allied Chemical Corporation,* 695 F.2d 854, 857 (5th Cir. 1983). Plaintiffs rely on the *Mississippi Code* of 1942, as amended, Section 36, Laws 1966, Chapter

317, Section 1, effective from and after passage (approved June 15, 1966), which stated that:

> The legal rate of interest on all notes, accounts and contracts shall be six percent (6%) per annum but contracts may be made, in writing, for a payment of a rate of interest as great as eight percent (8%) per annum.

Thus, plaintiffs contend that the 8% maximum contract rate of interest governs the entire 1969 to 1974 period involved in this litigation. To the contrary, defendants rely on Paragraph (6) of § 75-17-1, Miss. Code Ann. (Supp. 1975), which establishes the maximum interest rate for extensions of credit that are incidental to retail sales. *Allied Chemical*, 695 F.2d at 857. Paragraph (6) of the 1974 amendment to the Mississippi interest rate statute, Chapter 564, Laws of 1974 (now appearing as § 75-17-1, et seq.), provides:

> (6) Notwithstanding the foregoing and any other provision of law to the contrary, any retail seller, and any lender or issuer of credit cards may lawfully contract for and receive a finance charge for credit sales of goods, services or merchandise certificates or for cash advanced or other credit extended pursuant to a revolving charge agreement by applying a periodic rate no greater than one and one half percent (1 1/2%) per month to:
>
> (a) the average daily balance of the account, exclusive of finance charge, in each billing period;
>
> (b) an amount that shall not exceed the balance of the account exclusive of the finance charge, on the first day of each billing period without adding purchases or miscellaneous debits to the account during the billing period; or

> (c) any balance of the account during each billing period which does not produce an amount of finance charge in excess of that permitted by (a) or (b). Notwithstanding the foregoing, the maximum finance charge which may be charged or collected on any balance in excess of Eight Hundred Dollars ($800.00) shall be determined by applying a periodic rate no greater than one and one quarter percent (1 1/4%) per month to that portion of the applicable balance which is in excess of Eight Hundred Dollars ($800.00) but not greater than Twelve Hundred Dollars ($1,200.00) and by applying a periodic rate not greater than one percent (1%) of the principal balance which exceeds Twelve Hundred Dollars ($1,200.00). . . .

Additionally, Paragraph (9) defines finance charge in the 1974 amendment:

> (9) The term "finance charge" . . . means the amount of rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including but not limited to interest, . . . finance charges, . . . discount, . . . service charges, transaction charges, activity charges, carrying charges . . . or any other cost or expense to the debtor for services rendered or to be rendered . . . . A licensee under the Small Loan Regulatory Act . . . and the Small Loan Privilege Tax Law . . . may contract for and receive finance charges as authorized by paragraph (7) hereof regardless of the purpose for which the loan or other extension of credit is made.

Finally, defendants argue that the retroactive application of Chapter 564, Laws of 1974 [which appeared as section 75-17-1, et seq., (Supp. 1975)] brings the interest rates charged within the provisions of the statutes so as

to defeat the contentions that the charges by defendants were usurious.

Supportive of its argument of retroactivity, defendants cite the Mississippi Supreme Court's ruling in *Cappaert v. Bierman*, 339 So.2d 1355, 1357 (Miss. 1976), that the 1974 amendment to the interest rate statute applied retroactively.

In *Cappaert*, plaintiff brought suit against a defendant on the ground that the note sued on was part of a usurious transaction. The Court stated:

> Mississippi Code Annotated section 75-17-1 (1972) established the maximum lawful interest at a rate of eight percent per annum. Section 75-17-1 was amended by Chapter 564, Laws of 1974 [now appearing as § 75-17-1, et seq.] and became effective July 1, 1974. Chapter 564 increased the legal rate of interest, for loans of this nature, to a maximum of ten percent per annum. The judgment appealed from was dated December 19, 1974. The trial judge was of the opinion that it was immaterial which law governed the transaction, because in his opinion the transaction was usurious under either law.
>
> Section 7, Chapter 564, Laws of 1974 [now appearing as Mississippi Code Annotated section 75-17-17 (Supp. 1975)], states:
>
> Loans made and credit extended prior to the effective date of this act shall continue to be governed by the provisions of laws governing such loans and extensions of credit which were in force at the time such loans or extensions of credit were made, including laws repealed hereby *except that finance charges contracted for or received prior to the effective date of this act shall not be unlawful if the finance charge contracted for or received conforms with the provisions of this act*

> *or other law then in effect.* Any loan or note renewed, refinanced, deferred or otherwise extended or altered on or after the effective date of this act shall conform with the provisions of this act. (Emphasis supplied in the original).
>
> We hold that the 1974 statute as written applies retroactively, and that the ten percent yield provided in that law should be applied to the present case in determining whether usury was stipulated for or received.

Cappaert, 339 So.2d at 1357.

Defendants also cite a Tennessee district court's ruling to corroborate its contention that the interest rate charged was not usurious because of the retroactive application of § 75-17-1, et seq., Miss. Code Ann. (Supp. 1975). *Walters v. First National Bank of Memphis*, No. 74-267-M (W.D. Tenn., June 12, 1985). In *Walters*, plaintiff, a Mississippi resident and BankAmericard bank cardholder, filed an action seeking damages pursuant to 12 U.S.C. §§ 85 and 86 alleging that interest charged was usurious under Tennessee law. Ruling that Mississippi law applied, the Tennessee Court held that the charges were not usurious under the usury statutes of either Mississippi or Tennessee. Citing § 75-17-17, Miss. Code Ann. (Supp. 1975), the Tennessee court stated:

> The disputed transactions were, according to defendant, tailored to fit the law of Mississippi at the time. Whether or not this is true is irrelevant since the retroactivity provision brings the charges here squarely within the law . . . . Finally, while plaintiff is correct in asserting that federal law controls in cases concerning national banks, 12 U.S.C. §§ 85 and 86, both incorporate by reference state usury laws. Thus, the federal rates are keyed to the state rates and must

> change as the respective states see fit, even retroactively. Federal law has long recognized that the retroactive lifting of usury limits is permissible since usury laws are generally remedial, rather than substantive. *Ewell v. Daggs*, 108 U.S. 143 (1883). The fact that 12 U.S.C. § 86 provides a penalty for the violation of a usury limit does not in any way unhinge it from state usury laws. To rule otherwise would place national banks on an unequal footing with state banks, contrary to the intent of the drafters of the National Bank Act. *See, Tiffany v. National Bank of Missouri*, 18 Wall. 409 (1874).

Walters, supra, at 5-8.

Thus, defendants' primary position is that the *Cappaert* ruling of the retroactivity of § 75-17-1, et seq., must be applied to defendant national bank so as to place it on an equal basis with all other lenders of credit in Mississippi in the spirit of the "most favored lender doctrine" espoused under 12 U.S.C. § 85 of the National Bank Act. Plaintiffs do not dispute that *Cappaert* expressly upholds the retroactive application of § 75-17-1, et seq., Miss. Code Ann. (Supp. 1975), but argues [sic] that such retroactive application is contra to the dictates of the federal savings statute, 1 U.S.C. § 109.

Section 109 of Title 1 of the United States Code provides that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under the repealed statute *unless the repealing Act expressly provides* and that the repealed statute shall be treated as still in force for a proper action or prosecuting for the enforcement of such penalty, forfeiture, or liability.

The federal Act pertaining to this case adopts not only the numerical interest rates set by state statute, but

also the entire case law of the state interpreting the state's limitations on usury. *First National Bank In Mena v. Nowlin, supra,* at page 876, 12 U.S.C. § 85. Mississippi law has expressly stated that newly enacted statutes, with no saving clause specifically included in any repealed or modified statutes extinguished any accrued right in the usury statute. *Deposit Guaranty Bank & Trust Co. v. Williams,* 9 So.2d 638 (Miss. 1942). The Mississippi Supreme Court stated:

> Many decisions in this state have affirmed the rule, which generally prevails, that the effect of a repealed statute is to abrogate the repealed statute as completely as if it had never been passed, and that a statute modifying a previous statute has the same effect as though the statute had all the while previously existed in the same language as that contained in the modified statute, unless the repealing or modifying statute contains a saving clause. (Citations omitted).
>
> The result of this rule is that every right or remedy created solely by the repealed or modified statute disappears or falls with the repealed or modified statute unless carried to final judgment before the repeal or modification, – save that no such repeal or modification shall be permitted to impair the obligation of a contract or abrogate a vested right. . . . Rights of action or defenses on account of usury are not a part of the common law. They are solely the creations of statute, and such statutes are in the nature of regulations in the public interest. Although a right conferred solely by statute in the public interest may have accrued before the repeal or modification, it does not follow that the accrued right in such cases is a vested right, in the constitutional sense. There is no vested right in the usury laws which, therefore, may be

> repealed or changed so as to affect causes of action and defenses even in pending suits. 12 C.J., p. 974; 16 C.J.S., Constitutional Law, § 254. By the great weight of authority, the legislature may repeal a usury law and no one has any vested right to take advantage of such laws. 12 Am.Jur. p. 65.

Deposit Guaranty Bank & Trust Co. v. Williams, 9 So. 2d at 640.

Similarly, the United States Supreme Court has held that the repeal of a usury law, without a savings clause, operated retrospectively to cut off the defense for the future, even in actions on contracts previously made, thereby rejecting all arguments of deprivation of vested rights or impairment of the obligation of contract. *Ewell v. Daggs*, 108 U.S. 143, 151, 2 S.Ct. 408, 413, 27 L.Ed. 682 (1883).

Consequently, the Court finds no conflict between 1 U.S.C. § 109, a federal savings statute, and the retroactive application of Miss. Code Ann. § 75-17-1 (Supp. 1975). Section 109 of Title 1 of the United States Code is applicable to the repeal of any federal statute. This in no way imposes a restriction upon the power of a state to repeal, modify, or make retroactive its usury statute merely because 12 U.S.C. § 85 adopts the maximum rate of interest allowable by the state.

"MOST FAVORED LENDER" DOCTRINE

Derivative of 12 U.S.C. § 85 the "most favored lender" doctrine, was first established in *Tiffany v. The National Bank of the State of Missouri*, 18 Wall. 409, 85 U.S. 862, 21 L.Ed. 862 (1873). In *Tiffany*, the United States

Supreme Court held that national banks were authorized under 12 U.S.C. § 85 to charge interest at the maximum rate permitted by state law for the state's most favored lender. *Tiffany*, 18 Wall. at 411. *Tiffany* resolved the issue of whether the 30th section of the act of Congress of June 3, 1864 (presently 12 U.S.C. § 85), prohibited national banking associations in the State of Missouri from charging a greater rate of interest than eight percent (8)% which was the rate limited by the laws of the state for banks organized under its laws. *Id.* at 410. Finding that the State of Missouri allowed all persons, except banks organized under the state laws, to charge ten percent (10%) per annum as interest, the Court held that defendant Bank of Missouri charges of nine percent (9%) on loans made were not usurious. Thus, reasoning that national banks were not restricted to the rate allowed to banks of the state where a greater rate was allowed to individual lenders generally, the Court stated:

> It cannot be doubted, in view of the purpose of Congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions. This was considered indispensable to protect them against possible unfriendly legislation . . . unfriendly legislation might make their existence in the state impossible. . . . The only mode of guarding against such contingencies was that which, we think, Congress adopted. It

> was to allow national associations the rate allowed by the state to natural persons generally, and a higher rate, if state banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. . . . National banks have been national favorites. . . . In harmony with this policy is the construction we think should be given to the 30th section of the Act of Congress we have been considering. It gives advantages to national banks over their state competitors. . . . The result of this is that the defendants in receiving nine percent interest upon the loans made by them have not transgressed the Act of Congress and consequently they are under no liability of the plaintiff.

Tiffany, supra, at 412-413.

It is defendants' contention that the *Tiffany* ruling, 12 U.S.C. § 85 of the National Bank Act, accorded national banks the right to charge the interest rate afforded state competitors, whether such competitors were state banks or non-bank lenders. *Norway Lanes v. Hackley Union National Bank & Trust Co.,* 464 F.2d 855 (6th Cir. 1972).[1]

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[1] The "most favored lender" status for national banks under *Tiffany* has since been incorporated into the regulations of the Comptroller of Currency. *See* 12 C.F.R. §7.7310(a) which recites:

> (a) A national bank may charge interest at the maximum rate permitted by State law to any competing State-chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate.

In 1974, the Mississippi Legislature, pursuant to House Bill No. 819, Chapter 564, amended the state's usury statute, Miss. Code Ann. §§ 75-17-1 (Supp. 1975). The preamble to the Act recites that it is:

> AN ACT to simplify and modernize the laws governing the lending of money, usury, extending credit, and the making of credit sales; to protect consumers against unfair practices by suppliers of credit and to provide rate ceilings; to permit and encourage the development of sound consumer credit practices and to insure an adequate supply of credit.

Section 75-17-1 was amended to permit rates of interest in all notes, accounts, and contracts of six percent (6%) except that contracts could be made in writing for payment of finance charges as otherwise provided by the Act. Miss. Code Ann. § 75-17-1 (Supp. 1975). Section 75-17-1(2) permitted any borrower to contract for payment of a finance charge of ten percent (10%) per annum for any loan or other extension of credit made directly or indirectly to the borrower. The amendment also provides that domestic or foreign corporations and non-profit corporations organized to own, operate, or finance an educational facility could agree to pay any rate of finance charge in excess of the maximum rate provided under § 75-17-1, but not to exceed fifteen percent (15%) per annum on any contract or other obligation under which the principal balance to be repaid exceeded $2,500.00. Miss. Code Ann. § 75-17-1(2)(3) (1975 Supp.). Section 75-17-1(6) under the Act provided that *any lender or issuer of credit cards may lawfully contract and receive a finance charge from one percent (1%) to one and one half percent (1½%) per month.* For any loan or extension of credit made

by a licensee under the Small Loan Regulatory Act and Small Loan Privilege Tax Law, the Act provided that the licensee could contract for and receive finance charges from twelve percent (12%) to thirty-six percent (36%) per annum depending on balances to be repaid. § 75-17-1(7)(a)-(d). The retroactive provision of the Act provided loans made or credit extended prior to the Act's effective date, July 1, 1974, would be governed by the laws in force at the time such loans or credit were extended *except that finance charges contracted for or received prior to the Act's effective date would not be unlawful if the finance charge complied with the provisions of the Act* or other law then in effect. Chapter 564, Laws of 1974 [now appearing as section 75-17-17 (Supp. 1989)].

CONCLUSION

Inasmuch as Mississippi's usury statute is highly penal in nature, it must be strictly construed in favor of the creditor. *Allied Chemical Corp. v. McKay*, 695 F.2d 854, 857 (5th Cir. 1983). Accordingly, the court is of the opinion that the retroactive application of Mississippi's 1974 amendment to its usury statute, *Cappaert v. Bierman*, 339 So.2d 1355 (Miss. 1976), and the application of the most favored lender doctrine pursuant to the retroactive statute, *see, Tiffany*, 18 Wall. 409, entitled the defendants to lawfully charge a maximum interest rate of one and one-half percent per month on unpaid credit card balances. This determination disposes of the question of usury. However, the defendants alternatively contend, pursuant to the most favored lender doctrine and Mississippi's 1958 Small Loan Act, that a national bank could lawfully charge twelve (12) percent to thirty-six (36) percent per

annum on unpaid credit card balances. In light of the court's determination that the defendants did not engage in usurious practices, it is not necessary to dispose of this issue. However, in passing, the court has considered the recent Mississippi Supreme Court decision in *Denley v. Peoples Bank of Indianola*, 553 So.2d 494 (Miss. 1989), with regard to the defendants' contention that they were entitled to claim most favored lender status under the 1958 Small Loan Act. The Mississippi Supreme Court quoted a recent statement of Comptroller of the Currency regarding the most favored lender doctrine:

> A national bank may charge interest at the maximum rate permitted by State law to any *competing* State-chartered or licensed lending institution. If State law permits a higher interest rate on a specific class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or Morris plan bank, without being so licensed. (Citations omitted).
>
> * * *
>
> Bank and Amici misread the (most favored lender) doctrine to provide that if any lender in the state may engage in a practice regarding interest rates or finance charges, a bank covered by the doctrine may seize upon the state authority and employ it across the board even to credits in no way of the class covered by the sate enactment and notwithstanding that any state-chartered competitors are prohibited the rates.

553 So.2d at pages 503, 504.

This court is not prepared to rule that small loans and credit card charges are the same class of credits. Moreover, the plaintiffs do not assert that the defendants' alleged usury occurred in connection with small loan transactions. The court sees the 1958 Small Loan Act question as a separate issue unrelated to the allegations of credit card usury in this case.

Finally, the defendants' claim to be absolved of usury pursuant to the combined mandates of the time-price doctrine and the most favored lender doctrine. A solidly embedded principle of Mississippi law, the time-price doctrine has been explained by the Mississippi Supreme Court as follows:

> Where property is sold on credit, the fact that the difference between the credit price and the cash price exceeds the percentage permitted by the usury laws will not render a transaction usurious if the parties acted in good faith. A vendor may fix on his property one price for cash and another for credit, and the mere fact that the credit price exceeds the cost price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties but not to the courts, barring evidence of bad faith. If the parties have acted in good faith, such a transaction is not a loan, and not usurious.

The Court is of the opinion that the time-price differential or the time-price doctrine is inapplicable to the case *sub judice*. A review of Mississippi case law sustaining the doctrine reveals that the doctrine has exclusively been applied to installment sales contracts for a fixed term of repayment. The differential between the cash price quoted to a consumer and the credit price selected by the

consumer was not considered interest by the Mississippi Supreme Court. *Mullins v. Merchandise Sales Company*, 192 So.2d 700, 704 (Miss. 1966); *Bryant v. Securities Investment Company*, 102 So.2d 701, 702 (Miss. 1958).

Thus, the court finds that the 1974 amendment to Miss. Code Ann. § 75-17-1, *et seq.*, applies retroactively to preclude the plaintiffs' usury claims. The court further finds that the time-price doctrine does not apply to the circumstances of this case.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the motion of the plaintiffs for partial summary judgment is hereby denied, and the motion of the defendants for summary judgment is hereby granted in accordance with this opinion. A separate judgment shall be entered in accordance with the local rules.

SO ORDERED, this, the 15th day of June, 1990.

/s/ Henry T. Wingate
UNITED STATES DISTRICT JUDGE

Civil Action No. J81-0508
Memorandum Opinion and Order

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI JACKSON DIVISION

RICHARD ROPER,
Administrator, et al on
behalf of themselves and
all others similarly situated

Plaintiffs

vs.

CONSURVE, INC., d/b/a
BankAmericard Center and
Deposit Guaranty National
Bank,

Defendants

CIVIL ACTION
NO. J81-0508(W)

FILED
JUN 22 1990

JUDGMENT

Plaintiffs and Defendants, having each filed Motions for Summary Judgments herein, and the Court having considered the same and expressed its opinion in the Memorandum Opinion and Order filed herein on June 15, 1990.

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiffs' Motion for Summary Judgment be and hereby is denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendants' Motion for Summary Judgment be and hereby is granted in accordance with the Opinion and Order entered herein on June 15, 1990.

Summary Judgment is hereby entered in favor of the Defendants, and this cause should be, and hereby is,

finally dismissed, with prejudice to and costs against the Plaintiffs.

SO ORDERED AND ADJUDGED this the 21st day of *June*, 1990.

/s/ Henry T. Wingate
HENRY T. WINGATE,
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

April 24, 1991

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 90-1592 – Roper, etc. v. Consurve, Inc., d/b/a Bank-Americard Center, etc.

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. *A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.*

The judgment entered provides that plaintiffs-appellants, cross-appellees pay to defendants-appellees, cross appellants the costs on appeal to be taxed by the Clerk of this Court.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: /s/ Rhonda Flowers
Deputy Clerk

Enclosure
Mr. Robert P. Dunniston
Mr. Frederick G. Helmsing ✓
Mr. Champ Lyons, Jr. ✓
Mr. W. Robert Wilson, Jr.
Mr. Vardaman S. Dunn
Mr. William F. Goodman, Jr.

U.S. CONSTITUTION, ARTICLE VI CLAUSE 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

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1 U.S.C. 109

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

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12 U.S.C. 85

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place

of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. 86

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred.

12 U.S.C. 1785(g)

(g) interest rates

(1) If the applicable rate prescribed in this subsection exceeds the rate an insured credit union would be permitted to charge in the absence of this subsection, such credit union may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this subsection, take, receive, reserve, and charge on any loan, interest at a rate of not more than 1 per

centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such insured credit union is located or at the rate allowed by the laws of the State, territory, or district where such credit union is located, whichever may be greater.

(2) If the rate prescribed in paragraph (1) exceeds the rate such credit union would be permitted to charge in the absence of this subsection, and such State fixed rate is thereby preempted by the rate described in paragraph (1), the taking, receiving, reserving, or charging a greater rate than is allowed by paragraph (1), when knowingly done, shall be deemed a forfeiture of the entire interest which the loan carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover, in a civil action commended in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to or twice the amount of interest paid from the credit union taking or receiving such interest.

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12 U.S.C. 1831d

(a) Interest rates

In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank

or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

(b) Interest overcharge; forfeiture; interest payment recovery

If the rate prescribed in subsection (a) of this section exceeds the rate such State bank or such insured branch of a foreign bank would be permitted to charge in the absence of this section, and such State fixed rate is thereby preempted by the rate described in subsection (a) of this section, the taking, receiving, reserving, or charging a greater rate of interest than is allowed by subsection (a) of this section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover in a civil action commenced in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to twice the amount of the interest paid from such State bank or such insured

branch of a foreign bank taking, receiving, reserving, or charging such interest.